

1 ANDREW P. BRIDGES (CSB No. 122761)
2 abridges@fenwick.com
3 ILANA RUBEL (CSB. No. 221517)
4 irubel@fenwick.com
5 TODD R. GREGORIAN (CSB No. 236096)
6 tgregorian@fenwick.com
7 KATHLEEN LU (CSB No. 267032)
8 klu@fenwick.com
9 FENWICK & WEST LLP
10 555 California Street, 12th Floor
11 San Francisco, CA 94104
12 Telephone: 415.875.2300
13 Facsimile: 415.281.1350

14 Attorneys for Defendants
15 GIGANEWS, INC., and
16 LIVEWIRE SERVICES, INC.

17 UNITED STATES DISTRICT COURT
18 CENTRAL DISTRICT OF CALIFORNIA
19 WESTERN DIVISION

20 PERFECT 10, INC., a California
21 corporation,

22 Plaintiff,

23 v.

24 GIGANEWS, INC., a Texas Corporation;
25 LIVEWIRE SERVICES, INC., a Nevada
corporation; and DOES 1 through 100,
inclusive,

26 Defendants.

27 GIGANEWS, INC., a Texas Corporation;
28 LIVEWIRE SERVICES, INC., a Nevada
Corporation,

29 Counterclaimants,

30 v.

31 PERFECT 10, INC., a California
32 Corporation,

33 Counterdefendant.

34 Case No.: 11-cv-07098-ABC (SHx)

35 **DISCOVERY MATTER**
36 *Before Hon. Stephen J. Hillman*

37 **DEFENDANTS GIGANEWS, INC.
38 AND LIVEWIRE SERVICES,
39 INC.'S NOTICE OF MOTION AND
40 MOTION TO COMPEL
41 DISCOVERY COMPLIANCE AND
42 FOR SANCTIONS**

43 Date: September 8, 2014

44 Time: 2:00 P.M.

45 Courtroom: 550 (Roybal)

46 Discovery Cut-off: June 30, 2014

47 Pretrial Conference: January 19, 2015

48 Trial Date: January 27, 2015

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on September 8, 2014 at 2:00 p.m., or as
 3 soon thereafter as counsel may be heard in Courtroom 550 of the United States
 4 District Court for the Central District of California, located at 255 East Temple
 5 Street, Los Angeles, CA 90012-3332, pursuant to the Court's June 27, 2014 Civil
 6 Minutes (Dkt. 338) and Local Rule 37, Giganews, Inc. and Livewire Services, Inc.
 7 ("Defendants") will and hereby do move for the following relief:

8 1. **Dismissal of Perfect 10's Claims and Default Judgment in favor of**
 9 **Defendants Under Rule 37(b):** For failure to meaningfully participate in the
 10 discovery process, the Court recommends the District Judge dismiss with prejudice
 11 all of Perfect 10's claims against Defendants and grant default judgment in favor of
 12 Defendants on their counterclaims.

13 2. **Preclusionary Sanctions Under Rule 37(b):** For failure to produce
 14 documents pursuant to the Court's discovery orders, Perfect 10 shall be precluded
 15 from contending, at any hearing or trial and in support or opposition to any motion

- 16 ▪ That Defendants or their agents took any volitional act that directly infringed
 17 a Perfect 10 copyright.
- 18 ▪ That Defendants had the right and practical ability to control activities of
 19 users of their services or the Usenet that Perfect 10 contends infringed a
 20 Perfect 10 copyright.
- 21 ▪ That Defendants had a direct financial interest, or direct financial benefit
 22 from, in such activities.
- 23 ▪ That Defendants failed to take simple measures to prevent damage to Perfect
 24 10's copyrights or copyrighted works, following any actual knowledge of an
 25 infringement.
- 26 ▪ That Defendants took affirmative steps to foster infringement of Perfect 10
 27 copyrights.

1 ■ That Perfect 10 has suffered irreparable harm as a result of any of the actions
 2 of Defendants.

3 **3. Full Compliance with the Court's Past Orders:**

4 Plaintiff Perfect 10 shall, within thirty (30) days of this order, fully comply
 5 with the Court's past discovery orders of March 17, 2014 (Dkt. 223), April 24,
 6 2014 (Dkt. 254); June 5, 2104 (Dkt. 311); and June 23, 2014 (Dkt. 326). All
 7 privilege objections are overruled: Perfect 10 is instructed that it must not withhold
 8 any responsive document or information based on a claim of privilege.

9 Perfect 10 will provide separate declarations under oath by Norman Zada and
 10 its counsel regarding Perfect 10's search efforts for each request and interrogatory
 11 in the Court's past orders. These declarations should separately identify, for each
 12 request, all steps taken to search for relevant documents or information, including
 13 identifying all computers, electronic media, and paper files searched, all computers,
 14 electronic media, and paper files maintained but did not search, the date range of
 15 the documents they searched, all search terms employed for electronic searching,
 16 and all other search methods employed. These declarations should separately
 17 identify by Bates number, for each request, what responsive documents Perfect 10
 18 produced.

19 Each of the Perfect 10-affiliated witnesses shall, within thirty (30) days of
 20 this order, fully comply with each of the Court's past discovery orders of June 5,
 21 2014 (Dkt. 312); June 18, 2014 (Dkt. 320); and July 8, 2014 (Dkt. 342) that pertain
 22 to them. All privilege objections of Craig Yamato, Melanie Poblete, and Wendy
 23 Augustine are overruled: each of them is instructed that he or she must not withhold
 24 any responsive document or information based on a claim of privilege.

25 Each of the Perfect 10-affiliated witnesses and their counsel shall also
 26 provide declarations under oath regarding their search efforts for each request in the
 27 Court's past orders. These declarations should separately identify, for each request,

1 all steps taken to search for relevant documents or information, including
 2 identifying all computers, electronic media, and paper files searched, all computers,
 3 electronic media, and paper files maintained but did not search, the date range of
 4 the documents they searched, all search terms employed for electronic searching,
 5 and all other search methods employed. These declarations should separately
 6 identify by Bates number, for each request, what responsive documents each
 7 witness produced.

8 4. **Further Depositions Under Rule 30(d)(1):** Perfect 10 and each of
 9 the Perfect 10-affiliated witnesses (Craig Yamato, Sean Chumura, Szabolcs Apai,
 10 Melanie Poblete, Wendy Augustine, Mike Saz, and Sheena Chou) shall appear for
 11 further depositions at a mutually agreeable time and place, not to exceed seven (7)
 12 hours each, regarding the documents that they failed to produce until after their
 13 depositions and/or at the end of the fact discovery period (or after), and all matters
 14 that appear in those documents.

15 5. **Attorney Fees and Expenses:** Perfect 10 and each of the Perfect 10-
 16 affiliated witnesses (Craig Yamato, Eileen Koch, Sean Chumura, Szabolcs Apai,
 17 Melanie Poblete, and Wendy Augustine) shall pay Defendants' reasonable
 18 attorneys' fees and costs incurred in connection with the following:

- 19 1. The two previous motions that Defendants filed and the resulting Orders of
 20 this Court—Dkt. 322 [Yamato Compliance Order] and Dkt. 342 [Third-Party
 21 Witness Compliance Order];¹
- 22 2. This motion for sanctions that Perfect 10's and the Third-Party Witnesses'
 23 conduct has necessitated; and
- 24 3. Taking the depositions of Perfect 10 and the Third-Party Witnesses regarding
 25 the documents that they failed to produce until after their depositions and/or

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¹ In deciding this Order, the Court stated that “[s]anctions are deferred until there
 28 is full compliance with this Order.” Dkt. 342 at 6, ¶9.

1 at the end of the fact discovery period (or after), and all matters that appear in
 2 those documents.

3 Perfect 10 and each of the Perfect 10-affiliated witnesses will be jointly and
 4 severally liable for these amounts. Within fourteen (14) days of this Order,
 5 Defendants will file an application for attorneys' fees and costs based on detailed
 6 declarations and time sheets demonstrating the amounts that Defendants incurred
 7 and their reasonableness regarding Nos. 1 and 2, and a good faith estimate of the
 8 amount of attorneys' fees and costs that Defendants will incur regarding No. 3.

9 Within fourteen (14) days of Court's further order establishing the amount of
 10 monetary sanctions, Perfect 10 and the Perfect 10-affiliated witnesses shall:

- 11 1. Place an amount equal to the portion of monetary sanctions attributed to
 12 Defendants' redeposition of Perfect 10 and its affiliated witnesses into
 13 escrow. Such amount shall be released to Defendants only upon Defendants'
 14 further application and a Court Order.
- 15 2. Perfect 10 shall post a bond establishing the amount of monetary sanctions to
 16 insure payment of such monetary sanctions to Defendants.

17 Defendants' Motion to Compel Discovery Compliance and for Sanctions is
 18 based on this Notice of Motion, the Joint Stipulation re this Motion, the
 19 Declarations of Todd R. Gregorian and Joseph S. Belichick and the Exhibits
 20 thereto, filed concurrently herewith, all other pleadings and papers on file in this
 21 action, any matters of which this Court may take judicial notice, and such other
 22 evidence and argument as may be presented at or before the hearing on this matter.

23 Dated: August 18, 2014

FENWICK & WEST LLP

24 By: /s/ Andrew P. Bridges
 25 Andrew P. Bridges

26 Attorneys for Defendants
 27 GIGANEWS, INC., and
 28 LIVEWIRE SERVICES, INC.